**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| **RALPH E. MIRARCHI, ESQUIRE and RALPH E. MIRARCHI LAW ASSOC., P.C.** | : | **CIVIL ACTION** |
| **v.** | : | |
| **WESTPORT INSURANCE CORP.** | : | **NO. 99-4331** |

**AMENDED MEMORANDUM**

**Padova, J.** **April 28, 2003**

Plaintiffs have brought this action against Westport Insurance Corporation ("Westport") for breach of contract and insurance bad faith arising from Westport's failure to defend and indemnify Ralph E. Mirarchi ("Mirarchi") in a malpractice action in the Bucks County Court of Common Pleas. Before the Court is Defendant's Motion for Summary Judgment. For the reasons which follow, the Motion is granted.

I. FACTUAL BACKGROUND

Plaintiff Ralph E. Mirarchi is an attorney who practices law as the sole shareholder of Ralph E. Mirarchi Law Associates, P.C. Defendant issued Lawyers' Professional Liability Insurance Policy No. PLL-330113-7 (the "Policy") to Ralph E. Mirarchi Law Associates, P.C. The Policy is a claims made policy with a Policy Period of September 1, 1998 until September 1, 1999. When he completed his application for the Policy on August 10, 1998, Mirarchi answered the following question "no":

> Is the Applicant, its predecessor firms or <u>any</u> individual proposed for this insurance aware of any circumstance, act, error, omission or

> personal injury which might be expected to be the basis of a legal malpractice claim or suit that has not previously been reported to the firm's insurance carrier.

(Def.'s Statement of Undisputed Facts ¶ 15, emphasis in original.)

On March 4, 1999, Mirarchi was served with a complaint which accused him of professional malpractice in connection with the estate of Daniel A. Wallace, M.D. (the "Wallace Estate"). That action was captioned The Estate of Daniel A. Wallace, M.D., by and through Judith E. Fairweather-O'Neill, Executrix v. Ralph E. Mirarchi, Esquire, No. 97-003905-09-02, Court of Common Pleas of Bucks County (the "Bucks County Action"). Mirarchi forwarded a copy of the complaint to Defendant, Defendant retained counsel to represent Mirarchi in the Bucks County Action under a reservation of rights.

The complaint filed in the Bucks County Action (the "Malpractice Complaint") alleges the following: Daniel A. Wallace died on September 19, 1994, leaving a will dated March 26, 1985. (Malpractice Compl. ¶ 2.) Mirarchi was Wallace's attorney and the scrivener of his will. (Id. ¶ 9.) Wallace executed two codicils to the will prior to his death. (Id. ¶¶ 3-4.) The first codicil, dated July 18, 1993, devised real property located at 3216 Rhett Road, Philadelphia, Pennsylvania to Joan Pickford. (Id. ¶ 3.) The second codicil, dated July 15, 1994, devised real property located at 191 Devonshire Road, Devon, Pennsylvania to Joan Pickford. (Id. ¶ 4.) At the time of Wallace's death, both properties were

encumbered by mortgages and neither the Will nor the codicils provided that Pickford should receive either property free of debt. (Id. ¶¶ 5-6.) On October 3, 1994, Judith E. Fairweather-O'Neill, the executrix of the Wallace Estate (the "Executrix"), hired Mirarchi as counsel for the Wallace Estate. (Id. ¶ 10.) On October 24, 1994, Mirarchi wrote to Pickford's attorney and informed him that the payment of the mortgages and taxes on the Devonshire Road and Rhett Road properties were the obligation of the Wallace Estate. (Id. ¶ 17.) Pennsylvania law provides that a specific devise of real property passes that property subject to any security interest.[1] (Id. ¶ 16.) Mirarchi never informed the Executrix that the Wallace Estate was not legally obligated to pay the mortgages on the Devonshire Road and Rhett Road properties. (Id. ¶ 18.) The Wallace Estate paid the monthly mortgage payments on the Devonshire Road property until that property was sold to a

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[1] 20 Pa. Cons. Stat. Ann. § 2514 provides as follows:

> In the absence of a contrary intent appearing therein, wills shall be construed as to real and personal estate in accordance with the following rules:
> **(12.1) Property subject to a security interest.**--A specific devise or bequest of real or personal property passes that property subject to any security interest therein existing at the date of the testator's death, without any right of exoneration out of any other estate of the testator regardless [sic] whether the security interest was created by the testator or by a previous owner and any general directive in the will to pay debts.

20 Pa. Cons. Stat. Ann. § 2514(12.1) (West Supp. 2002).

third party. (Id. ¶¶ 19-20.) In connection with the sale, the Wallace Estate entered into an Indemnification Agreement with Pickford, drafted by Mirarchi, whereby the Wallace Estate acknowledged that it was responsible for the outstanding mortgage on the Devonshire Road property and that it was unable to satisfy that mortgage, and Pickford agreed to accept from the Wallace Estate a Note in the amount of the outstanding mortgage ($98,574.65). (Id. ¶¶ 21-25.) The Wallace Estate also made the monthly mortgage payments on the Rhett Road property for several months before paying $66,513.85 to satisfy that mortgage on December 28, 1995. (Id. ¶¶ 26-27.) The Wallace Estate also paid the property taxes and insurance on the Rhett Road property. (Id. ¶ 28.) The Executrix fired Mirarchi on December 28, 1996. (Id. ¶ 30.) On July 24, 1997, Pickford sued the Wallace Estate to enforce the terms of the Note and Indemnification Agreement. (Id. ¶ 32.) That action was settled on October 31, 1998. (Id. ¶ 34.) Pursuant to the terms of the settlement, Pickford received $25,000 and the Deed to the Rhett Road Property and the Wallace Estate was relieved of its obligations under the Note. (Id. ¶ 35.) The Malpractice Complaint asserted claims against Mirarchi for legal malpractice under both breach of contract and negligence theories. (Id. Counts I and II.)

On April 21, 1999, Defendant notified Mirarchi by letter that Westport would not defend or indemnify him in the Bucks County

Action. (Compl. Ex. F.) The April 21, 1999 letter states that General Exclusion B of the Policy applies to Mirarchi's claim and that Westport had no duty to defend, indemnify or provide coverage to Plaintiff in connection with the Bucks County Action. (Compl. Ex. F.) General Exclusion B of the Policy provides that the Policy does not cover any claim based upon the following:

> Any act, error, or omission or PERSONAL INJURY occurring prior to the effective date of this POLICY if any INSURED at the effective date knew or could have reasonably foreseen that such act, error, omission, circumstance or PERSONAL INJURY might be the basis of a CLAIM.

(Compl. Ex. D, ¶ XIV.B.) Defendant asserted, in the April 21, 1999 letter, that this exclusion applied because, in a deposition of Mirarchi taken on June 2, 1998, in connection with the litigation between Pickford and the Wallace Estate, Mirarchi indicated that he was aware of an act, error, omission or circumstance that triggered General Exclusion B. (Compl. Ex. F.) The April 21, 1999 letter cited pages 138-143 of the transcript of Mirarchi's deposition, in which he testified that: the Wallace Estate paid the mortgage on the Rhett Road property and made no provision to recoup that money from Pickford; he did not recall whether he told the Executrix that the Wallace Estate was not bound to pay off the mortgages; and the Wallace Estate had been left with a Note to Pickford and a debt paid by the Wallace Estate of $66,000 and no means of recovering that money for the estate. (Mirarchi Dep. at 138-143.)

After receiving the April 21, 1999 letter, Mirarchi filed this

action against Defendant, seeking a declaration that Westport is required to defend and indemnify him in the Bucks County Action and that he is entitled to restitution of all attorney's fees and costs he expended in defending the Bucks County Action. The Complaint also asserts claims for damages against Westport for breach of the insurance contract and insurance bad faith pursuant to 42 Pa. Cons. Stat. § 8371. The Court has been informed by the parties that the Bucks County Action has been terminated, however, the basis for that termination has not been made a part of the record before this Court.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it

believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "Speculation, conclusory allegations, and mere denials are insufficient to raise genuine issues of material fact." Boykins v. Lucent Technologies, Inc., 78 F. Supp. 2d 402, 407 (E.D. Pa. 2000). Indeed, evidence introduced to defeat or support a motion for summary judgment must be capable of being admissible at trial. Callahan v. AEV, Inc., 182 F.3d 237, 252 n.11 (3d Cir. 1999)(citing Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1234 n.9 (3d Cir. 1993)).

III. DISCUSSION

The issue before the Court is whether the malpractice claim

asserted in the Bucks County Action falls within General Exclusion B of the Policy. The Pennsylvania Supreme Court has summarized the principles to be used in interpreting the provisions of an insurance policy as follows:

> The task of interpreting a contract is generally performed by a court rather than by a jury. The goal of that task is, of course, to ascertain the intent of the parties as manifested by the language of the written instrument. Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement. Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language.

Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983) (citations omitted).

Defendant argues that General Exclusion B is unambiguous and should be construed to exclude coverage in this case. Defendant relies on Murphy v. Coregis Ins. Co., Civ.A.No. 98-5065, 1999 WL 627910 (E.D. Pa. Aug. 17, 1999); Coregis Ins. Co. v. Wheeler, 24 F. Supp. 2d 475 (E.D. Pa. 1998); and Ehrgood v. Coregis Ins. Co., 59 F. Supp. 2d 438 (M.D. Pa. 1998), all of which have found General Exclusion B to be clear and unambiguous. See Murphy, 1999 WL 627910 at * 4; Wheeler, 24 F. Supp. 2d at 478; and Ehrgood, 59 F. Supp. 2d at 443. The Court finds that General Exclusion B is clear and unambiguous.

Defendant has the burden of proving that General Exclusion B applies to exclude coverage in this action. Ehrgood, 59 F. Supp.

2d at 443. Policy exclusions are strictly construed against the insurer. Id. The Pennsylvania Supreme Court has not yet interpreted the meaning of the term "'reasonably foreseen' in the context of professional liability contracts." Wheeler, 24 F. Supp. 2d at 478. The United States Court of Appeals for the Third Circuit has examined this language and determined that the term "reasonably foreseen," as used in General Exclusion B, is a mixed subjective/objective standard and has adopted a two step analysis for determining whether an attorney could have reasonably foreseen that his or her act could result in a malpractice claim:

> First, it must be shown that the insured knew of certain facts. Second, in order to determine whether the knowledge actually possessed by the insured was sufficient to create a "basis to believe," it must be determined that a reasonable lawyer in possession of such facts would have had a basis to believe that the insured had breached a professional duty. That the insured denies recognizing such a basis on grounds of ignorance of the law, oversight, psychological difficulties, or other personal reasons is immaterial.

Selko v. Home Insurance Co., 139 F.3d 146, 52 (3d Cir. 1998).

In order to determine whether General Exclusion B applies in this case, the Court must first determine what facts were subjectively known to Mirarchi prior to the effective date of the Policy. The following facts are undisputed. As of June 2, 1998, prior to the effective date of the Policy, Mirarchi was aware that Pickford had sued the Wallace Estate with respect to the Indemnity

Agreement and the Note. Mirarchi testified, during his June 2, 1998 deposition, taken in connection with the litigation between Pickford and the Wallace Estate, that he caused the Wallace Estate to pay the mortgages on the Devonshire Road and Rhett Road properties because Joan Pickford was worried that if the mortgages were not paid, she would be evicted from her home. (Mirarchi Dep. at 94-95.) Mirarchi agreed, at this deposition, that the Indemnification Agreement which he prepared in connection with the sale of the Devonshire Road property specifically stated that the Wallace Estate was responsible for the payment of the outstanding mortgage on that property. (Mirarchi Dep. at 108.) Mirarchi also admitted, during his deposition, that in carrying out what he believed to be the wishes of the Wallace Estate, he did not necessarily fully comply with the Pennsylvania probate code:

> A: In terms of what people wanted to accomplish, they wanted the estate to be resolved in a plain fashion and everybody would – I can make statements concerning, concerning the disposition of personal property. It was evident as to what was being done. They wanted to satisfy the personal wishes of people. And it wasn't necessarily going to be done according to the letter of the law. . . .
> That's the way I perceive matters to be resolved. Everyone, everybody, without exception, I will say it as I said it before, I will say it again, there were never any wishes whatsoever to dislocate Joan Pickford from the Rhett Street property. That was her concern. That was psychologically the only thing that she cared about in her mind. She had a daughter. She did not want to be displaced. She needed reassurances along the

> way. She got them from me. I am sure she got them from the executrix at one time or another. That's my opinion. I think that's what happened.
>
> Q: The reassurances included the fact that the estate would pay the mortgage on the Rhett Road property.
>
> A. They were going to continue paying it until such time as monies became available. And that's the way it was going to be handled . . . because she didn't have the money. She didn't have sufficient income to keep that property going. She didn't have the money. It was that simple. There was nobody coming up with any kind of money for her to live in that house. It was only the estate, because of their benevolence, that came forth and made the payments on her behalf.

(Mirarchi Dep. at 116-118.) When specifically asked about 20 Pa. Cons. Stat. Ann. § 2514, which provides that a specific devise of real property passes the property to the devisee subject to any existing security interest, Mirarchi testified as follows: "If a person is dealing in estates, you are aware of the situation. You are aware of the code section. You're aware of the fact that you want to settle an estate, in an effort to resolve differences amongst parties, that you do things that are not ordinarily done, which was done in this case." (Mirarchi Dep. at 128.) Mirarchi also testified at his deposition that he may not have spoken with the Executrix prior to causing the Estate to pay off the mortgage on the Rhett Road property: "[w]e could have discussed it. We could have. I can't say with absolute certainty we did not. I can't say we did. We could have." (Mirarchi Dep. at 121.) He 17

also testified that the first time he communicated to Ms. Pickford, through her counsel, that she was obligated under Pennsylvania law to pay the mortgages on the Devonshire Road and Rhett Road properties was December 24, 1996, after the Indemnity Agreement and Note were executed and the mortgage on the Rhett Road property had been paid off. (Mirarchi Dep. at 125-27.) Mirarchi was also made aware, through the questions asked of him by the Wallace Estate's counsel at his deposition, that the Executrix held him responsible for causing the Wallace Estate to assume responsibility for the payment of those mortgages:

> Q: The provision of the probate code we were talking about, that says in essence that the property that passes through the will passes subject to the mortgages, right?
>
> A: That's correct.
>
> Q: And you were aware of that right from the get-go. And you have been aware of it before Mr. Wallace's estate was ever probated.
>
> A: It's not the first estate that we handled.
>
> Q: The fact that the estate here paid off the Rhett Road mortgage, that's inconsistent with the statements of the provisions of the probate code, right?
>
> A: Correct.
>
> Q: And this note here I need to review with you shortly because I am not exactly understanding what is happening. This note on its face appears to bind the estate to pay Ms. Pickford ninety-eight thousand plus; is that right?
>
> A: That's what it says.

Q: You drafted this document.

A: Yes. I would take responsibility for the drafting of it.

Q: What is, as you see it, what's the legal effect of this document? We are speaking of L-9 here.

A: Legal effect?

Q: Yes.

A: Legal effect would say, in essence, exactly what's being talked about here, that the property, in essence, we would owe her that money, that amount of money. That's what it looks like.

Q: Contrary to the provisions of the probate code, you have bound the estate to a ninety-eight thousand dollar debt; is that correct?

A: Correct.

Q: Similarly, contrary to the provision of the probate code, you paid off a mortgage on the Rhett Road property in the amount of sixty?

A: Sixty-six plus. . . .

Q: And the estate, the estate already paid that amount of money.

A: Correct.

Q: Is there a provision for the estate to recoupe [sic] that money from Ms. Pickford?

A: Not to my knowledge.

Q: Is there any document that you have seen or that you know of that would somehow indicate that Ms. Pickford is to return that money to the estate?

A: I am not aware of any.

Q: Mr. Mirarchi, you never told my client, the executrix, that the estate was not bound to pay off those mortgages, did you?

A: I don’t recall.

Q: Do you recall ever having discussions with her about who was obligated to pay off these mortgages?

A: I recall having many discussions with all parties, indicating to them that we would be attempting to resolve the estate to carry out what I perceive the wishes of Daniel Wallace.

Q: Are not the wishes of Daniel Wallace contained in his will?

A: I can’t truly answer that question. I truly can’t answer that question.

Q: You drafted the will, right, sir? And you testified earlier that the words and the provisions that you placed in the will are put at the direction of Mr. Wallace; isn’t that right?

A: Dr. Wallace.

Q: That’s right.

A: There are many, there are many aspects of what a person has as their last wishes. They don’t always lend themselves to legalities of placing them on a piece of paper. There is the dependency sometimes upon the individual practitioner to carry out their wishes sometimes between the lines and within the scope of what conversations have, in fact, been held with the decedent.

Q: Sir, I understand you may have been well intentioned. Are the specific terms of the probate code that you don’t read between the lines, you enforce what is written in the will; isn’t that right?

A: That’s correct.

> Q: In fact, the provision of the probate code that we have been talking about specifically states absent contrary intent in the will, the mortgage will be paid off by the devisee; isn't that right?
>
> A: It also says that payment of all just debts and obligations too.
>
> Q: Find. Absent contrary intent in the will, correct?
>
> A: That is correct.
>
> Q: And there is no contrary intent in the will that said that estate is to pay off those mortgages, isn't that right?
>
> A: There is nothing contrary to that intent in the will.

(Mirarchi Dep. at 136-140.)

The undisputed record before the Court shows that, prior to the time he applied for the Policy, Mirarchi had subjective knowledge of the following facts: the Pennsylvania probate code provides that a devise of specific real property passes to a devisee subject to existing security interests; Mirarchi caused the Wallace Estate to make payments on mortgages for the Devonshire Road and Rhett Road properties in violation of this provision of the Pennsylvania probate code; his representation of the Wallace Estate resulted in that estate being obligated to pay more than $150,000 on behalf of, or to, Pickford that it was not obligated to pay pursuant to Pennsylvania law; the Wallace Estate was involved in litigation concerning those payments; and, the Wallace Estate took the position, in its litigation with Pickford, that Mirarchi's

actions were contrary to Pennsylvania law and that the Executrix had not been informed of this fact.

Having determined the subjective facts known to Mirarchi prior to the effective date of the Policy, the second step of the Selko analysis is to determine objectively whether this knowledge was sufficient for Mirarchi to have a basis to believe that his conduct might be expected to be the basis of a legal malpractice claim. Selko, 139 F.3d at 152. The Court finds, on the basis of these undisputed facts, that a reasonable attorney in possession of these facts would have had a basis to believe that his conduct might be expected to be the basis of a legal malpractice claim. See Brownstein & Washko v. Westport Ins. Corp., Civ.A.No. 01-4026, 2002 WL 1745910, at *4 (E.D. Pa. July 24, 2002) (finding that a reasonable lawyer in possession of the following facts would have reason to believe they might form the basis of a malpractice action: "(1) following her conviction Maxwell had terminated her relationship with plaintiffs and retained new counsel to pursue post-conviction remedies; (2) one basis on which Maxwell sought to overturn her conviction was ineffective assistance of counsel; (3) Washko was subpoenaed to appear at a hearing where he gave extensive testimony concerning his representation of Maxwell; and (4) Maxwell's post-conviction motion for extraordinary relief was granted and a new trial was ordered.").

Plaintiffs argue that there is a genuine issue of material

fact for trial regarding the application of General Exclusion B for two reasons. They claim that the June 2, 1998 deposition should not have reasonably caused Mirarchi to conclude that the Executrix might file a malpractice action against him because he made the mortgage payments at her explicit instruction and, consequently, believed that he would not be liable to the Wallace Estate. (Pl.'s Ex. A ¶¶ 5-7, Ex. B at 9-11, Ex. C at 2-3.) They also maintain that it was reasonable for Mirarchi to conclude, on June 2, 1998, that his conduct would not form the basis of a malpractice action because he believed that the two year statute of limitations for any malpractice claim sounding in tort which could arise from his representation of the estate had run by the end of 1997. The Third Circuit has found that a subjective belief that a malpractice action would not have merit, or a belief that the statute of limitations may have run, is not sufficient to avoid application of the exclusion: "When an attorney has a basis to believe he has breached a professional duty, he has a reason to foresee that his conduct might be the basis of a professional liability claim against him. He cannot assume that the claim will not be brought because he subjectively believes it is time barred or lacks merit." Coregis Insurance Company v. Baratta & Fenerty, Ltd., 264 F.3d 302, 307 (3d Cir. 2001) (emphasis in original). Moreover, although Mirarchi maintains that he could not have reasonably believed that a malpractice action would be brought against him because he

believed that the two year statute of limitations for a malpractice action brought under a tort theory had run prior to the effective date of the Policy, his belief is not sufficient to create a genuine issue of material fact for trial. Malpractice actions in Pennsylvania may also be brought under a breach of contract theory, with a four year statute of limitations, which would not have run prior to the effective date of the policy. See id. at 308. Indeed, the Malpractice Complaint did assert a cause of action against Mirarchi for malpractice under a breach of contract theory. (Malpractice Complaint, Count I.) Accordingly, Mirarchi's subjective belief that he had viable defenses to any malpractice action which could be brought against him arising out of his representation of the Wallace Estate is not sufficient to create a genuine issue of material fact with respect to the application of General Exclusion B. Consequently, the Court finds, based upon the undisputed factual record, that the Bucks County Action falls within General Exclusion B of the Policy and, therefore, that Defendant is entitled to the entry of summary judgment in its favor.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
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| **RALPH E. MIRARCHI, ESQUIRE and RALPH E. MIRARCHI LAW ASSOC., P.C.** | : | **CIVIL ACTION** |
| **v.** | : | |
| **WESTPORT INSURANCE CORP.** | : | **NO. 99-4331** |

**AMENDED ORDER**

**AND NOW,** this 28th day of April, 2003, in consideration of Defendant's Motion for Summary Judgment (Docket No. 17), Plaintiffs' response thereto, and the oral argument of the parties held in open court on March 26, 2003, **IT IS HEREBY ORDERED** that the Motion is **GRANTED** pursuant to Federal Rule of Civil Procedure 56 and **JUDGMENT** is entered in favor of Defendant and against Plaintiffs.

BY THE COURT:

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John R. Padova, J.